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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KILLIAN BRAM MCDONALD,

Defendant and Appellant.

E060529

(Super.Ct.No. RIF1206284)

OPINION

APPEAL from the Superior Court of Riverside County. Gary B. Tranbarger,
Judge. Affirmed with directions.

Amy Parekh, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Christopher P.
Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Killian Bram McDonald is on probation after a jury convicted him of attempted robbery and burglary. Defendant challenges the following four fees on the basis that the trial court imposed them after declining his request to hold a hearing on his ability to pay and without sufficient evidence: booking fee, probation report fee, probation supervision fee, and presentence incarceration costs. The People respond that the trial court properly imposed the probation report fee because it noted that he would be on probation and would be able to find gainful employment. The People argue that defendant did not specifically object to the other three fees and therefore forfeited these claims on appeal. As discussed below we conclude that defendant did not forfeit these claims, the trial court improperly denied his request for a hearing, and any implied finding of ability to pay was not supported by substantial evidence.

FACTS AND PROCEDURE

Defendant, who was 18 years old at the time, worked at an ACE Hardware store. On August 30, 2012, the employees were counting the cash drawers after the store had closed for the day. Defendant came in by the back door, ran into the cash counting office wearing a mask, held up what the employee believed was mace or pepper spray¹ hidden under his long sleeve and said “Give me the money” while holding out an empty backpack. The store employee thought the man in the mask looked and sounded familiar, so he reached to lift up the mask at the same time defendant reached for the cash box and knocked it over. Defendant then ran out of the office, past another employee who had

¹ Defendant testified it was a green marker for a white board under his sleeve.

come to stand in the doorway, and out the back door. As defendant ran, the employee standing in the office doorway kicked him in the torso. Defendant dropped his backpack in one of the store aisles on the way out. About one minute later, defendant re-entered through the back door wearing the same clothes as had the robber. Defendant appeared to be nervous and said something to the effect of, “I’m sorry. I’m sorry. Don’t tell anyone. It was only a joke.”

On February 28, 2013, the People filed an information charging defendant with attempted robbery (Pen. Code, §§664, 211)² and burglary (§ 459).

Defendant’s first trial ended in a deadlocked jury.

Defendant’s second trial ended in convictions on both counts.

On January 27, 2014, the court sentenced defendant to 36 months of probation, with one of the probation conditions that he serve 90 days in jail. The court also imposed a number of fees and fines, including a \$450.34 booking fee (Gov. Code, § 29550.2), a probation report fee not to exceed \$1,095 (§ 1203.1b), a probation supervision fee not to exceed \$3,744 (§ 1203.1b), and presentence incarceration costs of \$996.94 (§ 1203.1c). Defense counsel asked the court to suspend the presentence incarceration costs, pointing out that, because defendant was going to spend some time in custody, “usually the Court will consider whether the defendant’s indigent or not or whether they’re working.” The court declined to suspend the fee or to hold a hearing, commenting, “Not at this time, not on this felony. Obviously, there’s an ability-to-pay clause in that. Same thing with the

² All further statutory references are to the Penal Code unless otherwise indicated.

restitution orders and things like that” The court then indicated defendant would receive a hearing on his ability to pay at a later time if he did not make the payments and the court needed to decide whether to send him to prison for not paying.

This appeal followed.

DISCUSSION

Defendant argues the trial court was required to, but did not, hold a hearing to determine his ability to pay the four fees specified above, and so the matter should be remanded for such a hearing. The People respond that the court impliedly found he had the ability to pay the probation investigation fee when it noted he was on probation and would have the opportunity to get a job. The People also argue defendant forfeited his right to appeal the other fees because he did not specifically object to them in the trial court.

Government Code section 29550.2 requires the court to determine the defendant’s ability to pay a booking fee before imposing the fee. “Any person booked into a county jail . . . is subject to a criminal justice administration fee for administration costs incurred in conjunction with the arresting and booking if the person is convicted of any criminal offense relating to the arrest and booking. . . . *If the person has the ability to pay*, a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person” The same requirement holds for the probation report and probation supervision costs, as set forth in section 1203.1b, subdivision (b)(2) (“At the hearing, *if the court determines that the defendant has the*

ability to pay all or part of the costs, the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county . . .”) and presentence incarceration costs as set forth in section 1203.1c (“[T]he court may, *after a hearing, make a determination of the ability of the defendant to pay . . . the reasonable costs of . . . incarceration pending disposition of the case.*”). In determining the ability to pay presentence incarceration costs, the court may consider the “Likelihood that the defendant shall be able to obtain employment within the one-year period from the date of the hearing.” (§ 1203.1c, subd. (b)(3).)

Forfeiture

Defendant answers the People’s forfeiture argument with the contention that defense counsel did object to the imposition of the presentence incarceration costs under section 1203.1c and that, based on the trial court’s answer to that objection, any additional objections to the other fines requiring an ability-to-pay finding would have been futile. A close reading of the record transcript and the law on this point supports this contention.

“Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile” (*People v. Welch* (1993) 5 Cal.4th 228, 237.) This is because the purpose of the forfeiture rule is to encourage the parties to bring errors to the trial court’s attention so that they may be corrected at that time. (*In re Wilford J.* (2005) 131 Cal.App.4th 742, 754.)

Here, defense counsel put the trial court and the People on notice that defendant wanted, and was entitled to, a hearing on his ability to pay when counsel said the following: “Your Honor, I would ask the Court to suspend the presentence incarceration costs. He’s not currently working. And if he’s going to be doing time in custody, as well, your Honor, *usually the Court will consider whether defendant’s indigent or not or whether they’re working.*” Further, based on the court’s response to this objection regarding the lack of an ability-to-pay determination before assessing presentence incarceration costs, it would have been futile for defense counsel to request a hearing on his ability to pay each of the other fees imposed: “*Not at this time, not on this felony. Obviously, there’s an ability-to-pay clause in that. Same thing with the restitution orders and things like that, there’s an ability to pay.* Hopefully, in the next three years, you’re going to ultimately get a good paying job and you’re going to start making these payments. [¶] You’re not going to go to jail, not going to go to prison because you’re poor. If you can’t make these payments, you’re not going to be violated, be sent to prison. You’ll only be sent to prison if you don’t make the payments and a Court, in a hearing, determines you could make the payments and you were just blowing us off.” The court declined to hold an ability-to-pay hearing “at this time” on the presentence incarceration costs, “restitution orders and things like that,” even though it acknowledged the “ability-to-pay clause.” This appears to us to be a blanket answer to any request by the defense regarding fees that require an ability-to-pay determination, including each of

the four fees that are the subject of this appeal. Therefore, defendant did not forfeit the ability to challenge these fees on appeal, and we will discuss the merits of this issue.

Sufficiency of the Evidence on Ability to Pay

Defendant disputes the People's response that, even though the court did not hold a hearing on any of the fees requiring an ability-to-pay finding, the court made an implied finding that he had the ability to pay these costs, which finding is supported by sufficient evidence. This implied finding took place, the People argue, when the court specifically noted that defendant would be on probation for three years, would have the ability to find gainful employment, and thus would have the ability to pay.

“The court's finding of the defendant's present ability to pay need not be express, but may be implied through the content and conduct of the hearings. [Citation] But any finding of ability to pay must be supported by substantial evidence. [Citations]” (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1398, disapproved on other grounds in *People v. McCullough* (2013) 56 Cal.4th 589, 592 and *People v. Trujillo* (2015) 60 Cal.4th 850, 858, fn. 5.) Here, the probation report does not address defendant's ability to pay and contains no information on his finances or employment. This information is completely missing from the record. At the sentencing hearing, the trial court heard that defendant's mother died between conviction and sentencing, his father had moved to Maryland with his five minor siblings, and that he had an adult sister who lived in Davis with her husband and children while both parents attended school. The court noted that there was no guarantee defendant would be able to transfer his probation to Maryland to be with his

father and siblings, or to Davis to be with his sister and family, commenting, “And if you have to stay here, in Riverside, with no support from your family, that’s too bad.” The only information on the record is that defendant was to serve 90 days in custody and was at the time of sentencing unemployed. Although the People seem to imply on page five of their brief that the typical able bodied person on probation is able to obtain employment and *ipso facto* has the ability to pay these fees, the People do not supply any legal authority that this in itself constitutes substantial evidence of ability to pay.

While we understand the position of the trial court that defendant needed to take responsibility for his actions, we conclude that defendant requested a hearing on his ability to pay, the trial court declined to provide that hearing “at this time” regarding any of the fees requiring an ability-to-pay finding, and the trial court’s implied finding of ability to pay because defendant was placed on probation is based on insufficient evidence.

DISPOSITION

The matter is remanded to the superior court to provide a hearing regarding defendant’s ability to pay the four types of costs and fees enumerated above, in accordance with the procedural and substantive requirements in the statutes regarding each. In all other respects, the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.